91-1499

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

No. 91-

In the
Supreme Court of the United States

October Term, 1991

DAVID A. JONES And CATHERINE M. JONES,
Petitioners,

v.

MELLON BANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DAVID A. JONES
Professor of Law and
Management
Graduate School of Public
and International Affairs
University of Pittsburgh
Box 7259
Pittsburgh, Pennsylvania 15213
412/734-8428

Attorney for Petitioners

March, 1992

91

QUESTIONS PRESENTED FOR REVIEW

(1) Has a state court violated the Due Process and/or Equal Protection Clause(s) of the Fourteenth Amendment or other applicable Federal law by entering judgment foreclosing a Federally-chartered bank's mortgage on a homeowner's real estate by summary judgment, without affording the homeowner a trial or even a prejudgment hearing, notwithstanding the homeowner's affidavits averring substantial prepayment of the mortgage ahead of schedule?

(2) Is a state statute repugnant to the Due Process and/or Equal Protection Clause(s) of the Fourteenth Amendment or other applicable Federal law where the statute denies a homeowner/consumer the right to a jury trial of disputed factual issues in a home mortgage foreclosure action involving a Federally-chartered bank mortgagee?

(3) Is service of a notice of suit and

of the complaint in a state home mortgage foreclosure action repugnant to the Due Process and/or Equal Protection Clause(s) of the Fourteenth Amendment or other applicable Federal law where a Federally chartered bank mortgagee purports to obtain in personam jurisdiction over the homeowner mortgagor via substitute service of process, without any proof of concealment?

(4) Does a Federally-chartered bank mortgagee lack legal standing to bring a state action to foreclose a homeowner's mortgage, where the mortgagee has assigned ownership of the mortgage to a separate but affiliated corporation prior to bringing or during maintenance of the action?

(5) May a Federally-chartered bank that has prevailed in a state mortgage foreclosure action obtain a judgment against the mortgagor for its attorneys' fees in excess of a contractual ceiling

drafted by the mortgage itself and contained within the mortgage note, limiting attorneys' fees to a maximum of five percent (5%) of the mortgagor's indebtedness upon default?

(6) Whether a state court judgment foreclosing a Federally-chartered bank mortgage is repugnant to the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment, or other applicable Federal law, where the state court ruled that monthly installments of principal and interest must be paid by the mortgagor, to avoid default, during each month in which they are due, notwithstanding a clause in the mortgage note expressly allowing the mortgagor to prepay any monthly installment at any time without penalty?

NOTE: Respondent, Mellon Bank, N.A., a Federally-chartered banking corporation, is a subsidiary of Mellon National Corporation and an affiliate of Mellon Financial Services Corporation Number Nine, a Delaware stock corporation to which Mellon Bank, N.A. assigned the Petitioner's mortgage at issue.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 9

REASONS~WHY THE WRIT SHOULD BE GRANTED

I. THE PENNSYLVANIA COURTS VIOLATED BOTH THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS, BY ENTERING JUDGMENT BY SUMMARY JUDGMENT FORECLOSING A FEDERALLY-CHARTERED BANK'S MORTGAGE ON A HOMEOWNER'S REAL ESTATE WITHOUT AFFORDING THE HOMEOWNER A TRIAL OR PREJUDGMENT HEARING, NOTWITHSTANDING THAT THE HOMEOWNER'S AFFIDAVITS OF RECORD AVERRED SUBSTANTIAL PREPAYMENT OF THE MORTGAGE WELL AHEAD OF SCHEDULE. 19

II. RULES 1038 AND 1150 OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE ARE REPUGNANT TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS BECAUSE THESE STATUTES, AS THEY WERE APPLIED IN THIS CASE, DENIED A HOMEOWNER/CONSUMER THE RIGHT TO A JURY TRIAL OF DISPUTED FACTUAL ISSUES IN THE FORECLOSURE OF A FEDERALLY-CHARTERED BANK'S HOME MORTGAGE. 27

III. SERVICE OF A NOTICE OF SUIT AND OF A COPY OF THE COMPLAINT VIA SUBSTITUTE SERVICE IN THIS STATE HOME MORTGAGE FORECLOSURE ACTION WITHOUT ANY PROOF OF CONCEALMENT WAS SUFFICIENTLY REPUGNANT TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO DEPRIVE THE COURTS OF IN PERSONAM JURISDICTION OVER THE HOMEOWNER MORTGAGORS. 31

IV. A FEDERALLY-CHARTERED BANK LACKS LEGAL STANDING TO BRING A STATE ACTION TO FORECLOSE A HOMEOWNER'S MORTGAGE WHERE THE BANK HAS ASSIGNED OWNERSHIP THEREOF TO A SEPARATE [ALBEIT AFFILIATED] CORPORATION. 35

V. A FEDERALLY-CHARTERED BANK THAT HAS PREVAILED IN A STATE MORTGAGE FORECLOSURE ACTION MAY NOT OBTAIN A JUDGMENT AGAINST THE HOMEOWNER MORTGAGOR FOR ITS ATTORNEYS' FEES IN EXCESS OF THE CONTRACTUAL FEE CEILING CONTAINED WITHIN THE NOTE [FIVE PERCENT (5%) OF OUTSTANDING INDEBTEDNESS IN THE INSTANT CASE] 38

VI. A STATE COURT JUDGMENT THAT FORECLOSES A FEDERALLY CHARTERED BANK MORTGAGE ON THE GROUND THAT MONTHLY INSTALLMENTS OF PRINCIPAL AND INTEREST MUST BE PAID DURING EACH MONTH IN WHICH THEY ARE DUE ON PERIL OF DEFAULT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS WHERE A CLAUSE IN THE MORTGAGE NOTE, DRAFTED BY THE BANK, ALLOWS THE MORTGAGOR EXPRESSLY TO PREPAY ANY MONTHLY INSTALLMENT WITHOUT PENALTY. 43

TABLE OF AUTHORITIES

Cases

Doehr v. Connecticut, ___ U.S. ___, 111 S.Ct. 506, 112 L.Ed.2d 519 (1991). 19, 26, 37

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). 29

Ferri v. Ackerman, 444 U.S. 193 (1979). .. 39

Gonzales v. Polis, 238 Pa.Super. 362, 357 A.2d 580 (1976). 33

U.S. Constitution

Article I, Section 10 ..... 3, 44

Amendment 7 ..... 28, 29

Amendment 9 29

Amendment XIV 2, 3, 14, 19, 20, 27, 28, 29, 30, 35, 37, 38, 41, 42

Statutes

Pa. R.Civ.P., Rule 402 32

Pa. R.Civ.P., Rule 410 ..... 4, 5, 31, 33

Pa. R.Civ.P., Rule 430(a) 4, 31, 33

Pa. R.Civ.P., Rule 1035 ..... 6, 7, 8, 20, 24, 25

Pa. R.Civ.P., Rule 1038 ..... 6, 27

Pa. R.Civ.P., Rule 1150 ..... 5, 27, 28

28 U.S.C. § 1257(3) 2

15 U.S.C. §§ 1601, et seq. 26, 41

No. 91-

In the
Supreme Court of the United States

October Term, 1991

DAVID A. JONES And CATHERINE M. JONES,
Petitioners,

v.

MELLON BANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners, David A. Jones and Catherine M. Jones, respectfully request that this Court grant their Petition for Writ of Certiorari seeking review of the Judgment of the Supreme Court of Pennsylvania entered on December 16, 1991, denying allowance of appeal from the Judgment and Opinion of the Superior Court

of Pennsylvania entered July 29, 1991.

OPINION BELOW

The Supreme Court of Pennsylvania denied allowance of appeal without opinion. The opinion of the Superior Court of Pennsylvania Panel is unreported but contained in the Appendix.

JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was entered December 16, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America provides as follows:

Section 1. ... No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the Constitution provides in pertinent part:

No State shall ... pass any ... Law impairing the Obligation of Contracts...[.]

The following provisions of the Pennsylvania Rules of Civil Procedure (hereinafter "Pa. R. Civ. P.") are pertinent:

Rule 430, Pa. R. Civ. P.

Service Pursuant to Special Order of Court. Publication

(a) If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

Rule 410. Real Property Actions

(a) In actions involving title to, interest in, possession of, or charges or liens upon real property, original process shall be served upon the defendant in the manner provided by Rule 400 et seq.

(b)(1) If in an action involving an interest in real property the relief sought is possession or mortgage foreclosure,

original process also shall be served upon an person not named as a party who is found in possession of the property. The sheriff shall note the service in the return. ...

(c) If service is made pursuant to an order of court under Rule 430(a), the court shall direct one or more of the following methods of service: ...

(2) posting a copy of the original process on the most public part of the property,

(3) registered mail to the defendant's last known address[.]

Rule 1150, Pa. R. Civ. P.

Trial without Jury

The trial of actions to foreclose a mortgage by a judge sitting without a jury shall be in accordance with Rule 1038.

Rule 1038. Trial without Jury

(a) Except as otherwise provided in this rule, the trial of an action by a judge sitting without a jury shall be conducted as early as may be as a trial by jury is conducted and the parties shall have like rights and privileges[.]

(b) The decision of the trial judge may consist only of general findings as to all parties but shall dispose of all claims for relief. The trial judge may, if he wishes, include as part of the decision specific findings of fact and conclusions of law with appropriate discussion.

Rule 1035. Motion for Summary Judgment

(a) After pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings and any depositions, answers to interrogatories, admissions on file and supporting affidavits.

(b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

...

(c) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an

order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

The Fourteenth Amendment to the Constitution of the United States of America

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive an person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mellon Bank, N.A., the Respondent, (hereinafter "Mellon Bank") obtained a state court judgment via summary judgment (without trial or any prejudgment hearing) foreclosing a mortgage that Petitioners, David A. Jones and Catherine M. Jones, (hereinafter "the Jones") had granted to it eleven (11) years earlier, which they had serviced flawlessly and even amortized at least a full year ahead of schedule by prepaying $9,000. in monthly installments due under terms of the mortgage note. Thereupon, Mellon Bank "sold" the secured property for $69,110. (about the amount of unpaid principal and interest remaining on the note) in a commercially unreasonable manner, although the secured property had a fair market value in excess of $365,000. at time of "sheriff's sale"; and thereafter Mellon Bank sought a deficiency judgment

against the Jones for $61,940.50, including $29,825.60 in Mellon Bank's attorneys' fees notwithstanding a clause in the mortgage note limiting attorneys' fees due and payable on default to five percent (5%) of the outstanding indebtedness, or, in this case, $4,240. maximum [5% of $84,800.].

On April 29, 1977, the Jones purchased their Westmoreland County, Pennsylvania water-view country estate on nine (9) acres for $106,500., subject to a mortgage in the amount of $84,800. which they granted to Mellon Bank, N.A., calling for the Jones to pay monthly installments of principal plus interest totalling $652.05, plus additional monthly "escrow" deposits [to cover taxes and insurance premiums]. For about eleven (11) years, indisputably, the Jones paid each monthly installment when it was due but, in addition, prepaid a total of $9,000 against <u>future</u> monthly installments <u>ahead</u>

of when these became due and payable.

In April, 1988, Mellon Bank commenced an action in mortgage foreclosure at civil action number 7157 of 1988 before the Court of Common Pleas of Westmoreland County, Pennsylvania, contending that the Jones had "missed" several monthly installments due on their mortgage and, consequently, had defaulted thereon, entitling Mellon Bank to accelerate the balance due thereunder. The Jones had tendered all monthly installments as due, and cannot explain conclusively why Mellon Bank failed to credit the payments upon receipt.

One reason why Mellon Bank may have not credited the Jones installment payments as these were received could be that at about that same time Mellon Bank had <u>assigned</u> the Jones' mortgage and note to a separate but affiliated corporation, Mellon Financial Services Corporation Number Nine, a

Delaware stock corporation headquartered in Denver, Colorado. The Jones learned of this assignment through their insurance carrier after the foreclosure action was commenced, and argued unsuccessfully before the state court that such an assignment deprived Mellon Bank of legal standing to bring or to maintain the mortgage foreclosure action [in effect, that Mellon Financial Services Corporation Number Nine, as assignee, alone possessed standing to sue, but was not a party to the action].

The Jones never received a copy of the Complaint or a notice of suit [equivalent to a summons in Pennsylvania] via hand delivery, although this form of process service is required under Pennsylvania's Rule of Civil Procedure, Rules 400 and 402, absent evidence of "concealment" by the party on whom service was attempted, not even alleged here. Nevertheless, because a

deputy sheriff visited the Jones home four times [twice finding no one home, once finding an under-age babysitter unqualified to accept service under Pennsylvania law, and once thinking someone, perhaps a child, was home], the state court entered an order allowing substitute service of process upon the Jones via "mailing and nailing" under Pennsylvania's Rules of Civil Procedure, Rule 430(a), in the absence of the required affidavit of "concealment" required under this Rule. The Jones objected before the trial court, timely but unsuccessfully, and the Superior Court of Pennsylvania affirmed this "service" as a proper conferral of in personam jurisdiction over the Jones.

Without waiving their objections based on the court's lack of jurisdiction, the Jones appeared to defend the action and in their first responsive pleading demanded a trial by jury, challenging as repugnant to

the Fourteenth Amendment Pennsylvania's requirement that mortgage foreclosure actions be tried by a judge sitting without a jury [via "bench" trial] pursuant to the Pennsylvania Rules of Civil Procedure, Rule 1038 and Rule 1150, The trial court ignored this challenge entirely, which sub silentio denial the Superior Court affirmed.

In fact, the trial court deprived the Jones of their right even to have a "bench" trial, and on September 12, 1990 it entered judgment by summary judgment against them in favor of Mellon Bank in the amount of $95,824.50 plus $14.21 per day from May 24, 1990, relying upon the Pennsylvania Rules of Civil Procedure, Rule 1035, which allows entry of summary judgment when there are no genuine issues of fact warranting a trial.

There were many genuine issues of fact warranting a trial, set forth by the Jones within their sworn affidavits filed timely

and properly with the trial court, although the trial court stated the Jones had filed no affidavits, which is false on its face. Among the issues of fact raised by the Jones via affidavits were: whether the Jones had transmitted all installments when due on their mortgage; whether the Jones had prepaid enough installments to "cure" any "missed" payments; the amount(s), if any, of "escrow" payments as to which the Jones were in arrears, and whether they had prepaid such sum(s) in advance. On review, the Superior Court found no error.

In entering summary judgment against the Jones, the trial court accepted at face value the exorbitant attorneys' "fees" that counsel for Mellon Bank submitted, at that time amounting to $10,177.26 [since then escalated to $29,825.60], which the trial court granted sub silentio by ignoring the clause contained within the mortgage note,

which Mellon Bank itself drafted, that placed a ceiling ("cap") on attorneys' fees at five percent (5%) of any outstanding indebtedness under the mortgage at time of default. Although the Superior Court found no error, there is plain error: even five percent (5%) of the original $84,800. note would be $4,240.; and five percent (5%) of the $61,033.88 unpaid principal remaining as of the "default" would be $3,051.69. The trial court failed even to address this issue, raised squarely before it; on the appeal, the Superior Court seemed unable to resolve this plain error, and so affirmed it.

The Superior Court seemed unable to grasp the fact the lower court's judgment contained $10,177.26 in attorneys' fees and in plain error calculated attorneys' fees as "$3,430.83," which it approved as $5% of the amount due." By accident or design, the

Superior Court ignored the fact that the lower court judgment was for $95,824.50, much more than the $68,616.66 the Superior Court must have assumed the "amount due" to be [multiplying the $3,430.83 attorneys' fees by factor twenty (20)] if in fact the attorneys' fees really were five percent (5%) of the "amount due," as the Superior Court declared. Consequently, what began as plain error before the trial court finished as even more egregious plain error on state appeal.

Before the trial court entered judgment by summary judgment against the Jones and in favor of Mellon Bank, the Jones cross-moved for summary judgment in their favor, which the trial court denied on October 26, 1990, without opinion and without a hearing.

Timely and properly, the Jones took an appeal as of right to the Superior Court of

Pennsylvania via notice of appeal filed on October 10, 1990 initially, [appeal from the lower court's denial of the Jones' cross-motion for summary judgment entered on October 26, 1990 was joined with this appeal via amended notice filed immediately thereafter]. On July 29, 1991, the Superior Court Panel affirmed the decisions of the Court of Common Pleas of Westmoreland County, via Memorandum Opinion.

On August 27, 1991, the Jones filed a timely and proper Petition for Allowance of Appeal seeking a Writ of Allocatur from the Supreme Court of Pennsylvania at Western District Allocatur Docket No. 461 of 1991, which the Supreme Court of Pennsylvania denied per curiam without opinion on December 16, 1991. This Petition for a Writ of Certiorari follows.

A R G U M E N T

I

THE PENNSYLVANIA COURTS VIOLATED BOTH THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS, BY ENTERING JUDGMENT BY SUMMARY JUDGMENT FORECLOSING A FEDERALLY-CHARTERED BANK'S MORTGAGE ON A HOMEOWNER'S REAL ESTATE WITHOUT AFFORDING THE HOMEOWNER A TRIAL OR PREJUDGMENT HEARING, NOTWITHSTANDING THAT THE HOMEOWNER'S AFFIDAVITS OF RECORD AVERRED SUBSTANTIAL PREPAYMENT OF THE MORTGAGE WELL AHEAD OF SCHEDULE.

This Petition for Certiorari asks the Supreme Court to review a variation of the question, vital to **consumer protection** and public policy, that it decided less than a year ago on June 6, 1991 in Doehr v. Connecticut, ___ U.S. ___, 111 S.Ct. 506, 112 L.Ed.2d 519 (1991).

This Court ruled in Doehr that a state statute authorizing a judge to allow the prejudgment attachment of real estate

without prior notice or hearing violates the Due Process Clause of the Fourteenth Amendment.

In the present case, a Pennsylvania statute became the pretext for a state judge's entry of judgment by summary judgment, also without an evidentiary hearing and without trial, foreclosing the Petitioners' homestead real estate [their primary home]. Foreclosure is much more egregious than mere attachment.

The same problems emerged in the present case as this Court found repugnant to the Federal Constitution in Doehr, some or all of which could have been avoided in the first place had the state judge been required by statute to hold an evidentiary hearing and, preferably, a trial. The opposite was true. Rule 1035, Pennsylvania Rules of Civil Procedure (hereinafter "Pa.R.Civ.P.") authorizes a trial judge to

enter a judgment of foreclosure where he alone is satisfied that controverted issues of fact are not "genuine."

In this case, for instance, Petitioners disputed via sworn affidavits [A. at 26a] the Respondent's allegation that they had become in "default" at all under the express terms of their mortgage and mortgage note, each of which Respondent drafted. The judge ignored Petitioners' pleas that the $9,000. they had prepaid on their mortgage note well ahead of schedule over a period of eight years constituted a set of monthly installments Respondent contended had to be paid during [rather than before] three months during 1988 when Respondent alleged it received no payments from Petitioners. Petitioners alleged they made required payments even during those months.

Specific terms of any mortgage or note

are critical to determining "default" thereunder, because Article 9-501(1) of the Uniform Commercial Code relinquishes definition of "default" to the language of the mortgage and mortgage note. Petitioners' mortgage note provided in pertinent part, as the Superior Court of Pennsylvania conceded [A. at 11 a]. that Petitioners were obligated to pay $652.05 on the first day of every month,

> with the privilege of paying all or any additional part of the principal debt on any installment payment day, no such prepayment, however, to alter the amount of the aforesaid monthly payments... .(Emphasis by the Superior Court of Pennsylvania).

Quite simply, Respondent alleged the prepayments it admitted receiving from Petitioners were credited to general debt reduction, and it disallowed Petitioners' request that these prepayments be applied to the three months in 1988 during which

Respondent contended it did not receive payments from Petitioners. Petitioners disagreed, insisting they had the right under the express terms of their note to designate specific months' installments to be credited against prepayments, and did so.

Without a trial or a prejudgment hearing at the least, Petitioners were powerless to explain how they intended the $9,000. they prepaid to be applied. This confusion is evident throughout the opinion of the Superior Court of Pennsylvania. That court concluded that "[Petitioners'] only evidence of this prepayment is a letter [from Respondent] which indicates that $8,000 was applied to principal." [A. at 11a]. That letter was <u>not</u> Petitioners' "only evidence" at all. Obviously, the Petitioners possess checks and other indicia documenting the entire $9,000. in prepayments, not merely the $8,000. which

the letter references. Petitioners never received their proverbial "day in court," however. Pennsylvania's summary judgment statute, Rule 1035, cut them off.

Without a trial or a prejudgment evidentiary hearing, also, Petitioners were powerless to confront Respondent on other issues germain to the presence or absence of "default" in their case. For instance, Petitioners contended via sworn affidavits that they did tender installment payments in and for the three months in 1988 when Respondent alleges these payments were not received, and document their veracity here with evidence of their flawless payments on or ahead of schedule over eleven (11) years previous thereto. Petitioners contended via sworn affidavits, also, that employees of Respondent advised them they did not need to be concerned about the payments alleged not to have been received in early 1988,

because these employees promised to "earmark" the prepayments to "cure" these "missed" installments. These are questions of fact requiring an evidentiary hearing.

The issue whether Petitioners ever "admitted they were in default," as the Superior Court assumed [A. at 27a] merely because the trial judge declared this on the basis of a sentence in a deposition of Petitioner David A. Jones, is an issue of fact, also. In fact, it is noteworthy that Petitioner Catherine M. Jones was never deposed, and never made such an admission even facially.

The Pennsylvania statute, Rule 1035, deprived Petitioners of any evidentiary hearing by investing the trial judge with unfettered discretion to rule, as he did, that these important issues of fact were not sufficiently "genuine" to warrant trial or hearing. The Pennsylvania appellate

courts merely ratified the state trial judge without further inquiry. This is the kind of repugnance to our Federal Constitution that this Court sought to redress in Doehr v. Connecticut, supra. It is the sort of repugnance this Court ought to review by granting certiorari in this case.

In these times of severe real estate recession, particularly, the conduct of lending institutions and, especially, of Federal banks bound by the Federal Consumer Credit Protection Act, 15 U.S.C §1601 et seq., becomes of national policy importance and further justifies certiorari in this case.

II

RULES 1038 AND 1150 OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE ARE REPUGNANT TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS BECAUSE THESE STATUTES, AS THEY WERE APPLIED IN THIS CASE, DENIED A HOMEOWNER/CONSUMER THE RIGHT TO A JURY TRIAL OF DISPUTED FACTUAL ISSUES IN THE FORECLOSURE OF A FEDERALLY-CHARTERED BANK'S HOME MORTGAGE.

Even if Petitioners had been afforded a trial to adjudicate factual disputes with Respondent relative to alleged default on their mortgage, Petitioners would not have received a trial by jury under Rule 1150 of Pennsylvania's Rules of Civil Procedure [hereinafter "Pa.R.Civ.P."].

Petitioners argue their deprivation of a jury trial denied them Due Process of Law and Equal Protection under the Laws because no "bench" trial can be the equivalent of a jury trial, notwithstanding Rule 1038,

Pa.R.Civ.P. which, as referenced in Rule 1150 [pertaining specifically to mortgage foreclosures], pledges vaguely:

> [T]he trial of an action by a judge sitting without a jury shall be conducted as nearly as may be as a trial by jury is conducted and the parties shall have like rights and privileges[.] (Emphasis added).

Especially in consideration of the sheer political power and influence a major national banking institution such as Respondent has over elected judges in its home state, no "bench" trial possibly can be the same as a jury trial. Moreover, the phrase "as nearly as may be" ought to be void for vagueness under the Fourteenth Amendment because even facially that term makes no sense, thereby denying Due Process.

The Founders of this Nation recognized the indispensability of trial by jury when they drafted and ratified the Seventh Amendment to the Federal Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Moreover, the Founders interfaced the Seventh with the Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construe to deny or disparage others retained by the people.

The basic right to a common law jury trial as a condition-precedent to a mortgage foreclosure was well-rooted in American law at the time the Due Process and Equal Protection Clauses of the Fourteenth Amendment were drafted and ratified in 1868; and these common law rights became concretized within the Fourteenth Amendment prior to the demise of "Federal common law" in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

III

SERVICE OF A NOTICE OF SUIT AND OF A COPY OF THE COMPLAINT VIA SUBSTITUTE SERVICE IN THIS STATE HOME MORTGAGE FORECLOSURE ACTION WITHOUT ANY PROOF OF CONCEALMENT WAS SUFFICIENTLY REPUGNANT TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO DEPRIVE THE COURTS OF IN PERSONAM JURISDICTION OVER THE HOMEOWNER MORTGAGORS.

Respondent asked for, and received from a state trial judge, a "special order of court" pursuant to Rules 410 and 430(a), Pennsylvania Rules of Civil Procedure [hereinafter "Pa.R.Civ.P."] purporting to allow Respondent to "serve" Petitioners with a copy of the Complaint and a "Notice of Suit" [Pennsylvania's equivalent of a summons] via substitute service of process. Early in the proceedings before the trial court, Petitioners objected to this form of "process" and, consequently, attacked the jurisdiction of the Pennsylvania state

courts to hear and determine this case until and unless Petitioners were hand served with process pursuant to Rule 402, Pa.R.Civ.P., which neither Petitioner ever has been. However, the Superior Court of Pennsylvania ruled that substitute service was proper [A. at 8a] merely because the trial court had authority to order the same, which authority the trial court had exercised.

The Superior Court Panel and the trial court allowed "service" of process via substitute service because a deputy sheriff had attempted to hand-serve process upon Petitioners on four (4) occasions. On one of those occasions, the sheriff thought someone was at home but could not document who this was. [Apparently, it was a child]. On another occasion, a babysitter answered the sheriff's knock at the door, but was too young to accept process. On two (2)

other occasions, the sheriff conceded no one was at home when he called. [A. at 8a].

Even Pennsylvania law requires "proof of concealment" as a condition-precedent to a court's issuance of an order pursuant to Rules 410 and 430(a); and caselaw of the Superior Court of Pennsylvania holds that a sheriff's affidavit merely stating "not found" is not sufficient evidence of concealment to permit substitute service under Rules 410 and 430(a). Gonzales v. Polis, 238 Pa.Super. 362, 357 A.2d 580 (1976).

Both the Superior Court Panel and the trial court ignored the Superior Court's own precedent in Gonzales v. Polis, supra, and other cases by allowing "service" via substitute service against Petitioners in the absence of any evidence of concealment. In doing so, the Pennsylvania trial and appellate courts denied Petitioners their

Federal entitlement to Equal Protection under the Laws as well as to Due Process of Law.

IV

A FEDERALLY-CHARTERED BANK LACKS LEGAL STANDING TO BRING A STATE ACTION TO FORECLOSE A HOMEOWNER'S MORTGAGE WHERE THE BANK HAS ASSIGNED OWNERSHIP THEREOF TO A SEPARATE [ALBEIT AFFILIATED] CORPORATION.

Respondent had assigned its right, title and interest in Petitioners' mortgage prior to, or at least soon after, bringing the present mortgage foreclosure action. This was evident from a notice of such an assignment Respondent made to Petitioners and Petitioners' insurance carrier, advising Petitioners and the carrier that the new first mortgagee was an affiliated but separate corporation known as Mellon Financial Services Corporation Nine, a Delaware stock corporation having its principal place of business situate in Denver, Colorado. [A. at 35a].

Upon this assignment, Respondent ceased

to possess any legal standing whatsoever to sue Petitioners, entitling Petitioners to judgment against Respondents dismissing the Complaint, for which Petitioners moved the trial court, timely and properly, via verified cross-motion for summary judgment dated August 28, 1990 and filed August 30, 1990. [A. at 34a-37a].

The trial court denied Petitioners' cross-motion for summary judgment. [A. at 23a], which denial the Superior Court Panel affirmed, [A. at 11a], finding no error on the ground Petitioners had "not produced any evidence to substantiate this claim." Id. In making this ruling, the Superior Court Panel ignored entirely Petitioners' Verified [Cross-] Motion for Summary Judgment, containing appended thereto as "EXHIBIT '1'" the Respondent's notice of its having assigned Petitioners' mortgage to Mellon Financial Services Corporation. [A. 35a-36a].

Even if the trial court did not commit error by denying Petitioners' cross-motion for summary judgment, that cross-motion, filed before the trial court entered summary judgment in favor of Respondents, provided a sufficiently "genuine" issue of fact to mandate trial or prejudgment hearing. See supra, Argument I. Indeed, an issue of fact such as what entity owns the mortgage being foreclosed at time of foreclosure obviates the significance of this Court's holding in Doehr v. Connecticut, ___ U.S. ---, 111 S.Ct. 506, 112 L.Ed.2d 519 (1991), and, in doing this, strengthens Petitioners' Argument I, supra.

V

A FEDERALLY-CHARTERED BANK THAT HAS PREVAILED IN A STATE MORTGAGE FORECLOSURE ACTION MAY NOT OBTAIN A JUDGMENT AGAINST THE HOMEOWNER MORTGAGOR FOR ITS ATTORNEYS' FEES IN EXCESS OF THE CONTRACTUAL FEE CEILING CONTAINED WITHIN THE NOTE [FIVE PERCENT (5%) OF OUTSTANDING INDEBTEDNESS IN THE INSTANT CASE]

Perhaps the most egregious flaw in the conduct of both Respondent and the Pennsylvania courts in the present case was the refusal of Respondent and the courts to limit Respondent's attorneys' fees to the ceiling ["cap"] of five percent (5%) of the Petitioners' "outstanding indebtedness" as expressed in the language of the mortgage note itself, which Respondent drafted.

On this issue, Respondent appears to have acted in maliciously bad faith; either the trial court did, also, or the trial judge was very negligent.[1] By contrast, the

---

[1] The trial judge, Hon. Daniel J. Ackerman, was the public defender whom this Court ruled was **negligent** when he failed to

Superior Court Panel appears to have intended to limit Respondent's attorneys' fees to the five percent (5%) ceiling, [A. at 13a], but misunderstood the amount of the trial court's judgment. This inconsistency becomes obvious by comparing the trial court's judgment for $95,824.50 [A. at 20a] and the Superior Court Panel's analysis of the same [A. at 13a]:

> [Petitioners] also contend that the attorneys' fees were unreasonable and beyond that ceiling of 5%. [Petitioners] base this argument on their calculations of indebtedness, which is $4,240.00. This is substantially lower than the judgment amount which [Respondent] calculated as follows:
>
> | | |
> |---|---|
> | Principal | $61,033.88 |
> | Interest through 8/31/88 | $ 3,890.91 |
> | Late Charges through 8/31/88 | $ 668.78 |
> | Escrow Deficiency thru [SIC] 8/31/88 | $ 3,023.20 |
> | Attorneys' Fees (5% of amount due) | $ 3,430.83 |

---

raise the five year statute of limitations applicable to the Internal Revenue Code. See Ferri v. Ackerman, 444 U.S. 193 (1979).

Even a cursory re-analysis of the Superior Court Panel's calculations reveal inescapably that the Panel thought the total indebtedness [excluding attorneys' fees themselves] was $68,616.60. Yet, Judge Ackerman's judgment by summary judgment was for $95,824.50 -- almost Thirty Thousand Dollars more!

Similarly, a cursory re-analysis of the Superior Court Panel's scoffing at the Petitioners' "calculations of indebtedness" will reveal that the $4,240.00 [A. at 13a] was <u>not</u> Petitioners' calculation of "indebtedness" at all but, far from it, the Petitioners' calculation of the <u>maximum</u> attorneys' fees they could ever owe under the terms of their mortgage note: five percent (5%) of the original $84,800. face amount of the mortgage and note.

Whether deliberate or negligent, these gross miscalculations by the trial and

appellate courts cannot be allowed to stand, because ipso facto they violate Petitioners' Due Process and, in doing so, violate Petitioners' Equal Protection: similarly-situated litigants do not face such gross mathematical miscalculations by trial courts, much less by state appellate courts, ordinarily.

This course of conduct by Respondent became has become a Federal question for reasons that go beyond the Fourteenth Amendment, also. Respondent, as a Federally chartered bank, is bound by the statutory provisions of the Federal Consumer Credit Protection Act, 15 U.S.C. §1601, et seq., among which are the protections of the Federal Fair Debt Collection Practices Act [§§801-817 of the Consumer Credit Protection Act, also known as the "Truth-in-Lending" Act]. It is an unfair debt collection practice for Respondent to

seek even a penny from Petitioners beyond what amount of money, if any, Petitioners owe to Respondent under the express terms of their mortgage and note. In this case, Respondent is seeking some Thirty Thousand Dollars in attorneys' fees to which they are not entitled as a matter of Federal law. The state trial and appellate courts have failed to meet their duty to prevent this wrong. Where there is a wrong, there is a remedy. Petitioners' remedy rests now before the Supreme Court of the United States.

VI

A STATE COURT JUDGMENT THAT FORECLOSES A FEDERALLY CHARTERED BANK MORTGAGE ON THE GROUND THAT MONTHLY INSTALLMENTS OF PRINCIPAL AND INTEREST MUST BE PAID DURING EACH MONTH IN WHICH THEY ARE DUE ON PERIL OF DEFAULT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, AND OTHER FEDERAL LAWS WHERE A CLAUSE IN THE MORTGAGE NOTE, DRAFTED BY THE BANK, ALLOWS THE MORTGAGOR EXPRESSLY TO PREPAY ANY MONTHLY INSTALLMENT WITHOUT PENALTY.

In addition to the foregoing, Respondent has conceded the true reason why it held Petitioners in "default" under the terms of their mortgage with Respondent is not that Petitioners' did not pay all of the installments as these became due; rather, it was because Petitioners paid all sums due before such sums came due and payable and thus, absurdly, according to Respondent, Petitioners did not pay each installment during the month when each came due for payment.

This argument would be absurd, facially, even if it were not barred by the terms of the Petitioners' mortgage note, expressly permitting Petitioners "the privilege of paying all or any additional part of the principal debt on any installment payment day. [A. at 11a], which prerogative Petitioners exercised in good faith believing that, in doing so, they were helping both Respondent and themselves by reducing indebtedness ahead of schedule. For this effort, the state courts foreclosed on Petitioners' mortgage and, in the months since, have "sold" the house for a tiny fraction of its fair market value.

C O N C L U S I O N

For each of the foregoing reasons, and for the concatenation thereof, this Court should review the Judgment of the Supreme Court of Pennsylvania denying allowance of appeal, consider this case on its merits via Writ of Certiorari, and then reverse the Judgment of the Superior Court of Pennsylvania affirming the Judgment of the Court of Common Pleas of Westmoreland County, so the latter may be vacated.

Respectfully submitted,

David A. Jones
Professor of Law and Management
Graduate School of Public & Internat'l. Affairs
University of Pittsburgh
Box 7259
Pittsburgh, Pennsylvania 15213

Attorney for Petitioners

Certificate of Service

I certify that on March ___, 1992 I served two true and correct copies hereof upon opposing counsel, Amy E. Bentz, Esquire, Kincaid, McGrath & O'Keefe, P.C., Two Gateway Center, 19th Floor, Pittsburgh, PA 15219, via first-class mail, postage pre-paid.

_____

APPENDIX

The Supreme Court of Pennsylvania
Western District

December 16, 1991

David A. Jones, Esquire
Professor of Law & Management
Graduate School of Public & Int'l. Affairs
University of Pittsburgh
3E Forbes Quadrangle
Pittsburgh, PA 15260

In Re: Mellon Bank, N.A. v. David A. Jones
and Catherine M. Jones
No. 461 W.D. Allocatur Docket 1991

Dear Mr. Jones:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"December 16, 1991
Petition Denied
Per Curiam"

Very truly yours,

s/ Irma T. Gardner

DEPUTY PROTHONOTARY

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

MELLON BANK, N.A.,	:	
	:	
v.	:	
	:	
DAVID A. JONES AND CATHERINE M. JONES,	:	
	:	
Appellants.	:	01932 Pittsburgh 1990

ORDER

AND NOW, this 29th day of July, 1991, it is ordered as follows:

__x__ Order affirmed.

BY THE COURT

s/ Eleanor R. Valecko

DEPUTY PROTHONOTARY

MELLON BANK, N.A.,) IN THE SUPERIOR COURT
) OF PENNSYLVANIA
Appellee,)
)
v.)
)
DAVID A. JONES AND)
CATHERINE M. JONES,)
)
Appellants.) 01932 Pittsburgh 1990

Appeal from the Order of the Court of Common Pleas, Civil Division , of Westmoreland County, No. 7157 of 1988.

Before:
TAMILIA, POPOVICH and MONTGOMERY, JJ.

MEMORANDUM: FILED: July 29, 1991

This is an appeal from a summary judgment entered in favor of Mellon Bank, N.A., (appellee). Finding no error, we affirm.

The parties executed a mortgage in 1977 for the original principal amount of $84,000.00. On September 22, 1988, appellee filed a Complaint in Mortgage Foreclosure because David A. Jones and Catherine M. Jones, (appellants) defaulted on their mortgage obligation. Appellants filed

preliminary objections, which were dismissed because service had not yet been effectuated. Appellee filed a Motion for Service of Process pursuant to Special Order of Court, which was granted. After substituted service was effectuated, appellants then filed an Answer to the Complaint in Mortgage Foreclosure and New Matter. After discovery, appellee filed a Motion for Summary Judgment which was granted. Appellants also filed a Motion for Summary Judgment, which was denied. The present appeal followed.

Appellants have raised four issues on appeal. We quote from appellants' brief as follows:

> I. THE COURT BELOW SHOULD HAVE GRANTED APPELLANTS' PRELIMINARY OBJECTIONS, AND DISMISSED THE COMPLAINT FOR LACK OF IN PERSONAM JURISDICTION OF THE PARTIES BECAUSE A SHERIFF'S RETURN OF "NOT FOUND" IS INSUFFICIENT EVIDENCE OF CONCEALMENT TO JUSTIFY SERVICE OF PROCESS PURSUANT TO SPECIAL ORDER OF COURT UNDER RULE 430, AND SERVICE WAS NEVER MADE BY HAND DELIVERY AS REQUIRED BY RULE 402.

II. THE COURT BELOW SHOULD HAVE GRANTED APPELLANTS' MOTION FOR SUMMARY JUDGMENT, BECAUSE APPELLEE LACKED STANDING TO SUE AT THE TIME IT FILED THE COMPLAINT: APPELLANTS WERE NOT IN ARREARS, HAVING PREPAID SOME $9,000. OF PRINCIPAL AHEAD OF SCHEDULE; AND APPELLEE FAILED TO COMPLY WITH A NUMBER OF THE REQUIREMENTS MANDATED BY RULE 1147 BY FAILING TO DESCRIBE ACCURATELY THE LAND SUBJECT TO MORTGAGE, FAILING TO STATE ACCURATELY THE AMOUNT DUE, AND FAILING TO REVEAL THAT THE MORTGAGE HAD BEEN ASSIGNED.

III. THE COURT BELOW SHOULD HAVE GRANTED APPELLANTS' REQUEST FOR A JURY TRIAL, TO COMPORT WITH DUE PROCESS OF LAW: OR, ALTERNATIVELY, SHOULD HAVE COMPLIED WITH REQUIREMENTS MANDATED BY RULES 1150 AND 1038 REGULATING TRIAL BEFORE A JUDGE SITTING WITHOUT A JURY; BUT OUGHT NOT TO HAVE GRANTED APPELLEE'S MOTIONS FOR SUMMARY JUDGMENT IN THE FACE OF APPELLANTS' AFFIDAVITS ADVANCING GENUINE ISSUES OF FACT.

IV. INASMUCH AS APPELLEE HAS REPRESENTED THE VALUE OF APPELLANTS' PROPERTY IS LESS THAN THE AMOUNT OF THE DEBT APPELLANTS OWE THEREON, THE ACTION IN MORTGAGE FORECLOSURE WAS IMPROPER AND OUGHT TO HAVE BEEN BROUGHT AS AN ACTION TO ENFORCE A PERSONAL LIABILITY AS REQUIRED UNDER RULE 1141(A), ENTITLING APPELLANTS TO A TRIAL BY JURY.

Appellants first claim that the trial court erred by denying their Preliminary

Objections.[1] Appellants specifically contend that the trial court did not have in personam jurisdiction because proper service was never obtained. The Pennsylvania Rules of Civil Procedure provide that original proces shall be served by the sheriff handing a copy to the defendant. Pa.R.C.P. 400,402. However, Pa.R.C.P. 430(a) provides that service can be effectuated pursuant to a special order of court:

> (a) If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

In the instant case, appellee filed a Motion for Service of Process Pursuant to Special Order of Court and

---

[1] The order denying appellants' preliminary objections was not a final appealable order. MacNeal v. I.C.O.A., Inc., 382 Pa.Super. 430, 555 A.2d 916 (1989). However, this issue is properly before this court because summary judgment has been entered.

Order of Court. This motion was accompanied by an affidavit which stated the nature and extent of the investigation and why service could not be made. The affidavit stated that appellee ascertained appellants' address from the United States Postmaster. This address was R.D. #2, Box 265-A, Saltsburg, Pennsylvania, 15681. Appellee received a notice from The Action Housing, Inc., indicating that a meeting with appellants was being held.The Saltsburg address was on this notice. Appellants also listed the Saltsburg address on an application for mortgage assistance filed with the Pennsylvania Housing Finance Agency.

The Sheriff of Westmoreland County was directed to serve appellants at the Saltsburg address. The sheriff attempted service on October 3, 1988, and reported that a baby-sitter would not accept service. On October 21, 1988 the complaint was reinstated and the sheriff was instructed to

serve appellants. The sheriff's return indicated that four attempts were made. On two of the attempts no one was home and on the other two someone was in the house but would not answer the door. This affidavit sufficiently states that the appellee made a good faith effort to locate appellants. Continental Bank v. Rapp, 335 Pa.Super. 160, 485 A.2d 480 (1984).

The trial court granted the Motion for Service of Process Pursuant to Special Order of Court and directed that the appellee was permitted to serve appellants by posting a copy of the original process on the most public part of the premises and by certified and first class mail.

Contrary to appellants' argument this was the proper procedure to effectuate service as provided by Pa.R.C.P. 410:

> Rule 410. Real Property Actions
>
> (c) If service is made pursuant to an order of court under rule 430(a), the court shall direct one or more of the

following methods of service:

> (1) publication as provided by Rule 430(b),
>
> (2) posting a copy of the original process on the most public part of the property,
>
> (3) registered mail to the defendant's last known address, and
>
> (4) such other methods, if any, as the court deems appropriate to give notice to the defendant.

Therefore, the trial court did not err by allowing the special service and by denying appellants' preliminary objections.

Appellants next claim that the trial court erred by not granting their motion for summary judgment. Appellants specifically contend that appellee lacked standing because: the indebtedness was incorrectly calculated; the complaint did not describe the land; the mortgage was assigned to Mellon Financial Services Corporation; and the attorney's fees were unreasonable.

When a defendant moves for summary

judgment, he is essentially alleging that the plaintiff's complaint has not stated a claim upon which relief may be granted. McHugh v. Litvin, Blumberg, Et Al., 525 Pa. 1, 574 A.2d 1040 (1990); Goldman v. McShain, 432 Pa. 61, 247 A.2d 455 (1968). When reviewing a summary judgment, we must accept as true all well-pleaded facts in the non-moving party's pleadings and give the non-moving party the benefit of reasonable inferences therefrom. Rybas v. Wapner, 311 Pa.Super. 50, 457 A.2d 108 (1983). A summary judgment may be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, reveal that there is no genuine issue of material fact. The moving party is entitled to summary judgment as a matter of law. Pa.R.C.P. 1035(b); French v. United Parcel Service, 377 Pa.Super. 366, 547 A.2d 411 (1988). We will not overturn a summary judgment unless there has been an error of

law or an abuse of discretion. Ackler v. Raymark Industries, Inc., 380 Pa.Super. 183, 551 A.2d 291 (1988).

Appellants contend that the indebtedness was incorrectly calculated because they prepaid nine thousand dollars in 1981 and 1982, and thus were not in arrears. There is nothing in the record that supports this claim. Appellants' only evidence of this prepayment is a letter which indicates that $8,000 was applied to the principal. This prepayment did not alter the terms of the mortgage note which provided as follows:

> ... Six Hundred Fifty Two and 05/100 Dollars ($652.05) on June 1, 1977, and on the same day of each succeeding month thereafter, to be applied first to interest at the rate of eight and one-half percent (8-1/2%) per annum on the unpaid balance of principal with the remainder to be applied to reduction of the principal debt, with the privilege of paying all or any additional part of the principal debt on any installment payment day, no such prepayment, however, to alter the amount of the aforesaid monthly payments...

Appellee produced evidence that appellants were in default under the terms of the mortgage. Appellants even admitted that they were in default and had not been making the required monthly payments.

Appellants also contend that the description of the property was inadequate. Appellee described the land by giving the Mortgage Book volume and page number located in the Recorder of Deeds Office in Westmoreland County. Appellee also attached a copy of the mortgage, which contained a detailed description of the property. Therefore, this claim is meritless.

Appellants contend that appellee assigned the mortgage to Mellon Financial Services Corporation. However, appellants have not produced any evidence to substantiate this claim.

Appellants also contend that the attorneys' fees were unreasonable and beyond that ceiling of 5%. Appellants base

this argument on their calculations of indebtedness, which is $4,240.00. This is substantially lower than the judgment amount which appellee calculated as follows:

Principal	$61,033.88
Interest through 8/31/88	$ 3,890.91
Late Charges through 8/31/88	$ 668.78
Escrow Deficiency thru 8/31/88	$ 3,023.20
Attorneys' Fees (5% of amount due)	$ 3,430.83

The complaint clearly stated that appellants were in default on the mortgage, and thus appellee had a cause of action. Therefore, appellants' claims are meritless, and the trial court did not err by accepting appellee's evidence as true and by denying the summary judgment. Rybas v. Wapner, supra.

Appellants next claim that the trial court erred by granting appellee's motion for summary judgment, and thus precluding their right to a jury trial. A party seeking to avoid the issuance of a summary

judgment may not rest upon the averments in the pleadings and must respond with evidence. This evidence may be in the form of depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of fact. Phaff v. Gerner, 451 Pa. 146, 303 A.2d 826 (1973); Washington Federal Sav. & Loan v. Stein, 357 Pa.Super. 286, 515 A.2d 980 (1986).

In the instant case, appellants have not substantiated their claims and have merely relied on the averments in their pleadings to avoid the summary judgment. Appellants have not offered evidence to contradict appellee's affidavit and have not shown that there was a genuine issue of material fact. Appellants have made bold unsupported assertions which, by themselves, cannot create genuine issues of material fact. Brecher v. Cutler, 396 Pa.Super. 211, 578 A.2d 481 (1990). In fact, appellants admitted in the deposition

that all of the mortgage payments were not made. Landau v. Western Pennsylvania National Bank, 445 Pa. 217, 282 A.2d 335 (1971); N.Y. Guardian Mortg. v. Dietzel, 362 Pa.Super. 426, 524 A.2d 951 (1987). Therefore, the trial court did not err by granting appellee's summary judgment. Washington Federal Sav. & Loan v. Stein, supra. Because the trial court did not err by entering summary judgment, appellants' claim that they were denied a jury trial is completely without merit.[2]

Appellants last claim that a mortgage foreclosure was the wrong action and that appellee should have brought an action for

---

2 Appellants filed a post-argument motion alleging that this appeal is governed by a recent United States Supreme Court decision in the case of Connecticut v. Doehr, ___ U.S. ___, 111 S.Ct. 506, 112 L.Ed.2d 519 (1990) [SIC]. We have reviewed appellants' motion and find that the Doehr case is inapplicable to the present appeal. The Doehr case involved an ex parte prejudgment attachment and it was determined that this procedure violated the Due Process Clause of the Fourteenth Amendment. The instant case was not an ex parte proceeding nor was there a prejudgment attachment. Therefore, the motion is denied.

enforcement of a personal liability. Appellants contend that appellee's counsel stated in "another proceeding" that the value of the property is less than the sum of the encumbrances thereon, and thus the present procedure was improper.

Appellants have not stated with any specificity exactly what this "another proceeding" entailed and there is no reference to the proceeding in the record. This court cannot consider facts which are outside of the record. Commonwealth v. Rini, 285 Pa.Super. 475, 427 A.2d 1385 (1981). This court may not take judicial notice of the records of another proceeding, whether in this court or in another court. Woolard v. Burton, 345 Pa.Super. 366, 498 A.2d 445 (1985); Coccia v. Coccia, 285 Pa.Super. 259, 427 A.2d 212 (1981). Therefore, appellants' claim is not supported by the record.

Moreover, appellants have not provided

this court with any authority for the proposition that if the encumbrances on property exceed the value thereof an action in mortgage foreclosure is improper.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MELLON BANK, N.A.,

Plaintiff

vs.

DAVID A. JONES and
CATHERINE M. JONES,

No. 7157 of 1988

Defendants

OPINION

BY THE COURT:

On September 22, 1988, Mellon Bank instituted an action in mortgage foreclosure against the defendants for their failure to met their monthly obligation of $652.05 on a 30-year $84,800 mortgage granted by the defendants to the bank in 1977.

The bank has filed a motion for summary judgment which will be granted since, after the taking of depositions and the filing of affidavits by the bank, there remains no material issue of fact to be tried.

The defendant, David Jones, has admitted in his deposition that he and his wife are in default under the terms of the mortgage and note, and that they have refused to make payments to the bank despite its demand that they do so. Deposition of David Jones, page 20, lines 7-15; page 35, lines 20-24; page 26, lines 3-9.

The affirmative defenses raised by the defendants in their new matter are not sustained by the evidence in the form of depositions or otherwise. The defendants have improperly tried to rely upon their pleadings to defeat the bank's motion, which they cannot do. Washington Federal Savings & Loan Asociation v. Stein, 357 Pa.Super. 286, 515 A.2d 980 (1986).

Accordingly, the following order will enter.

ORDER OF COURT

AND NOW, this 12th day of September, 1990, summary judgment is entered in favor of the plaintiff, Mellon Bank, N.A., and against the defendants, David A. Jones and Catherine M. Jones, in the amount of $95,824.50, plus interest at the rate of $14.21 per day from May 24, 1990, plus costs.

BY THE COURT:

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge

ATTEST:

_____
Prothonotary

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MELLON BANK, N.A.,

Plaintiff

vs.

DAVID A. JONES and
CATHERINE M. JONES,

No. 7157 of 1988

Defendants

ORDER OF COURT

AND NOW, this 2nd day of October, 1990, it appears to the court that:

(1) On September 12, 1990, the court granted summary judgment in favor of the plaintiff, Mellon Bank, N.A.

(2) On September 24, 1990, the defendants David A. Jones and Catherine M. Jones, filed with the court a "motion for post-trial relief from judgment by summary judgment entered September 12, 1990, pursuant to Rule 227.1, Pa. R. Civ. P. and defendants' motion to strike-off and open judgment had by summary judgment pursuant to Rule 2959, Pa. R. Civ. P."

(3) Neither Rule 227.1 nor 2959 provide the defendants vehicle for relief following the entry of summary judgment against them. Rather, the defendants recourse is to file an appeal from the order granting summary judgment to the Superior Court of Pennsylvania within thirty (30) days from the date of that order. Pa. R.A.P. 341 and 903.

NOW, THEREFORE, the defendants' motion for post-trial relief and motion to strike off and/or open judgment is denied.

BY THE COURT:

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge

ATTEST:

_____
Prothonotary

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MELLON BANK, N.A.
Plaintiff

vs.

DAVID A. JONES and
CATHERINE M. JONES,
No. 7157 of 1988

Defendants

ORDER OF COURT

AND NOW, to wit, this 26th day of October, 1990, IT IS HEREBY ORDERED that the defendants' Motion for Summary Judgment pursuant to Rule 1035 of the Rules of Civil Procedure is denied.

BY THE COURT:

s/ R.E. McCormick, Jr.
JUDGE RICHARD E. McCORMICK, JR.

ATTEST:

Prothonotary

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MELLON BANK, N.A.,
Plaintiff

vs.

DAVID A. JONES and
CATHERINE M. JONES,
No. 7157 of 1988

Defendants

ORDER OF COURT

AND NOW, this 4th day of January, 1991, a hearing upon the petition of the defendants to stay the sheriff's sale scheduled for January 7, 1991, is scheduled for the 7th day of January, 1991, at 8:30 a.m. before the undersigned.

BY THE COURT:

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge

ATTEST:

Prothonotary

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MELLON BANK, N.A.,

Plaintiff

vs.

DAVID A. JONES and
CATHERINE M. JONES,

No. 7157 of 1988

Defendants

ORDER OF COURT

AND NOW, this 7th day of January, 1991, the defendants' motion for a stay of the sheriff's sale scheduled for this date is denied. Further, it appearing that the defendants' motion for post-trial relief was decided by the order of October 2, 1990, the argument on the motion scheduled for January 25, 1991 is cancelled.

BY THE COURT:

s/ Daniel J. Ackerman
Daniel J. Ackerman, Judge

ATTEST:

Prothonotary

AFFIDAVIT OF CATHERINE M. JONES, M.S.W.
[Appended to Petitioners' Answer Opposing Respondent's Motion for Summary Judgment Before the Court of Common Pleas of Westmoreland County, Pennsylvania, Filed on June 29, 1992]

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF WESTMORELAND : ss.:

Catherine M. Jones, M.S.W. being duly sworn according to law, deposes and says of her own personal knowledge that:

1. She resides at RD#2, Box 265-A, Saltsburg, Westmoreland County, Pennsylvania 15681 with her five (5) minor children within the same premises Mellon Bank, N.A. seeks to sell following mortgage foreclosure at No. 7157 of 1988 in the Court of Common Pleas of Westmoreland County, Civil Division.

2. Robert J. Brown, Assistant Vice-President, Mellon Bank, N.A. is lying within his Affidavit dated May 25, 1990, which Deponent received June 9, 1990; in

in that the balance due on said mortgage is not $95,824.50.

3. The Note referenced by Robert J. Brown for Mellon Bank, N.A., attached to and made a part of his Affidavit dated May 25, 1990, specifically limits an attorney's commission to five percent (5%) of the total indebtedness, and the attorneys' fees claimed by Mellon Bank, N.A. in the amount of $10,177.26 far exceed said five percent (5%) figure. (By Mellon's own admission, the remaining principal is only $61,033.88; and escrow advances are only $10,373.21, so total indebtedness cannot possibly exceed the sum thereof, or $71,407.09. Five percent (5%) thereof could not exceed $3,570.35. Attorneys' "fees" invoiced are tripple what is allowed under terms of the Note, which is unconscionable.

4. As security for payment of a Note to Mellon Bank, N.A., Deponent, with her

husband, David A. Jones, executed a mortgage favor of Mellon Bank, N.A. dated April 29, 1977 in the original amount of $84,800.00, but pre-paid 9,000. ahead of the required monthly installments, during 1981 and 1982, thereby reducing the amount of principal reduction payments and interest payments she and her husband needed to make thereafter in order to keep the said mortgage "current," which they did well beyond May 3, 1988 when Mellon attempted to default Deponent and her husband on their mortgage, the first step toward an effort to deseize Deponent and her husband from their property.

5. Therefore, Robert J. Brown and Mellon Bank, N.A. are lying, when stating "the sum of $95,824.50 is due and owing" from Deponent and her husband, to Mellon Bank, N.A., "after allowing all just deductions, credits and set-off[.]" ...

7. Never has Deponent or her husband, David A. Jones, been in default on their mortgage in question to Mellon Bank, N.A., principal reduction on which has proceeded (and continues to proceed) ahead of schedule. Deponent and her husband have offered to "cure" escrow advances made by Mellon Bank, N.A. ... Deponent and her husband contend they are not obligated to pay any "late" charges, because at the time when Mellon commenced the present action tney were not in default at all. Deponent and her husband contend they have prepaid interest by reason of having prepaid $9,000. in 1981 and 1982 (the reduced principal caused regular monthly payment installments to accelerate payment of interest between 1981-1988). ...

9. Deponent never willfully failed to appear at any deposition. She never received notice [thereof or] was seriously

ill at the time[,] but [her lawyer] advised Mellon's attorneys she would be ready, willing and able to appear for deposition within a short time period thereafter if needed following her recovery from illness. Amy Bentz, Esquire, on Mellon's behalf, agreed to that postponement on the record[.]

10. Deponent never avoided service of process, and contends Mellon Bank or its agents failed to exercise due diligence prior to seeking and receiving the Court's purported authorization for constructive or substitute service. Since jurisdiction cannot be waived, Deponent believes this Court lacks jurisdiction even to try this action for mortgage foreclosure, much less to enter a judgment by summary judgment which, Deponent contends, would violate her Federal Constitutional rights to Due Process of Law and Equal Protection under the Laws[.] ...

12. Mellon Bank, N.A. unlawfully reported to various credit agencies, that Deponent and/or her husband had sustained "foreclosure" of the house secured by the mortgage Mellon now seeks to foreclose, and tendered such false reports in 1988 and 1989 when Deponent and her husband were not in arrears at all. As a consequence thereof, the aforesaid Grpahics International Corporation (a business owned in trust for the benefit of the Jones Family) was deprived of its rare opportunity to purchase control of 5,199 acres of land in New Hampshire -- Graphics International Corporation relied upon Deponent's ["01"] credit rating and of her husband's ["01"] credit rating -- after which 2,000 +/- acres of said land could have been placed in a public wildlife trust in consideration of an unliened fee of Two Million Dollars ($2,000,000.). This is a

lawful set-off to all sums of money claimed by Mellon Bank,, N.A., and itself warrants trial by jury. ...

13. Deponent has enjoyed a good faith opportunity to believe disputes with Mellon Bank, N.A. were settled to the satisfaction of the Bank, based on credit information and other reports indicating, seriatim, that the balance owing under the mortgage/note in question is zero and/or that the amount in arrears is zero, because Deponent and her husband "pay as agreed."

14. Deponent has provided evidence to attorneys for Mellon Bank, N.A., who have inaccurately and unreasonably distorted within their motion for summary judgment what they received, what they did not receive, and what they contend Deponent owes them ..., all of which points to need for trial and for trial by jury rather than for judgment by summary judgment[.]

15. Deponent has every intention of conducting further discovery of Mellon Bank, N.A., and/or its employees and agents[.] ... Deponent was not under the impression discovery in this state action was about to close, much less that the right to engage in discovery had closed. Consequently, Deponent contends Mellon's Motion for Summary Judgment is premature... [and]Deponent has a plethora of evidence available to rebut [Mellon's evidence] all of which will be presented at trial following completion of discovery that has not yet occurred.

FURTHER AFFIANT SAYETH NOT.

s/ Catherine M. Jones
Catherine M. Jones, M.S.W.

Sworn to and Subscribed
Before me this 27th day of June, 1990.

s/ Ethel I. Coleman
Notary Public

My Commission
Expires Oct 6, 1992

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

MELLON BANK, N.A.,	:	CIVIL DIVISION
	:	
Plaintiff,	:	No. 7157 of 1988
	:	
v.	:	
	:	
DAVID A. JONES And CATHERINE M. JONES,	:	
	:	
	:	
Defendants.	:	
	:	

VERIFIED

MOTION OF DEFENDANTS

FOR SUMMARY JUDGMENT PURSUANT TO

RULE 1035, PA. R.C.P.

COME NOW Defendants, by and through their counsel, DAVID A. JONES, ESQUIRE, and move Your Honorable Court to enter Summary Judgment in their favor, pursuant to Rule 1035, Pa.R.C.P., on grounds Plaintiff Mellon Bank, N.A. is no longer an "interested party" in the above-captioned and numbered case, to-wit:

1. The premises in question herein were encumbered, originally, by Defendants giving two (2) mortgages, a "first" and a "second" position, to Mellon Bank, N.A., the sole Plaintiff herein, on or about April 29, 1977.

2. Thereafter, in May, 1987, the "second" mortgage was paid-off by Defendants in its entirety, and no other "second" mortgage has been given.

3. Plaintiff, in seeking to "foreclose" its "mortgage" in this case, is referring solely to the original "first" mortgage dated April 19, 1977.

4. It has come to Defendants' attention, recently, that Plaintiff, at a time unknown presently to Defendants, assigned or otherwise transferred all of its right, title and interest in the aforesaid "first" mortgage of April 29, 1977 to an affiliate corporation known as

"MELLON FINANCIAL SERVICES," having an address situate in ... Colorado, and, upon information and belief, not being a Pennsylvania business/banking corporation.

5. The basis for Defendants' good faith belief is notice(s) afforded to Defendans' home owners' insurance carrier, Liberty Mutual Fire Insurance Company of Boston, Massachusetts, as reflected within the current policy thereto, appended hereto and incorporated by reference herein as EXHIBIT "1", infra. In this document, the "first" mortgage is listed as said "MELLON FINANCIAL SERVICES" of Colorado. ...

WHEREFORE, in view of the apparent assignment/transfer of Plaintiff Melon Bank, N.A.'s remaining legal interest in the mortgaged premises to another entity, Defendants move Your Honorable Court pursuant to Rule 1035, Pa.R.C.P., for Summary Judgment dismissing the Complaint

filed by or on behalf of Mellon Bank, N.A., which now lacks a legal interest entitling it to sue on the basis of the accrual of a cause of action in foreclosure.

Respectfully submitted,

s/David A. Jones
David A. Jones, Esquire,
Attorney for Defendants
Drawer D
Pittsburgh PA 15213-1104

DATED:
August 28, 1990

Verification

Under penalty of perjury, I hereby certify that I have read the foregoing, and the same s true to the best of my knowledge, information and belief, this 28th day of August, 1990.

s/David A. Jones

VERIFICATION

Under penalty of perjury I verify that the foregoing is true and correct, and that I have conversed via telephone with representatives of Mellon Financial Services Corporation, Denver, Colorado, who advised me that Mellon Financial Services Corporation holds the "first position mortgage" on property situate at RD#2, Box 265-A Saltsburg, Westmoreland County, Pennsylvania 15681, owned by Defendants David A. & Catherine M. Jones.

s/David A. Jones

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

BRIEF-JONES/MM

(2)

NO. 91-1499

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

DAVID A. JONES AND CATHERINE M. JONES,

Petitioners,

vs.

MELLON BANK, N.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

John R. O'Keefe, Jr., Esquire
Amy E. Bentz, Esquire
Kincaid, McGrath & O'Keefe, P.C.
Two Gateway Center, 19th Floor
Pittsburgh, PA 15222

ATTORNEYS FOR RESPONDENTS

APRIL 13, 1992

TABLE OF CONTENTS

		Page
Table of Authorities		i
I.	Counterstatement of the Questions Presented	1
II.	Counterstatement of the Case	2
III.	Reasons for Denying the Petition for Writ:	
	A. PETITIONERS HAVE FAILED TO IDENTIFY ANY SPECIAL OR IMPORTANT REASON TO JUSTIFY THIS COURT GRANTING THE PETITION AS REQUIRED BY UNITED STATES SUPREME COURT RULE 10.1	5
	B. THE DECISIONS OF THE PENNSYLVANIA COURTS INVOLVE NO CONFLICT OF OPINION WITH THIS COURT, ARE CORRECT AND REST ON INDEPENDENT NONFEDERAL GROUNDS	7
Conclusion		10

TABLE OF AUTHORITIES

Cases: **Page**

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L.Ed 2d 412 (1989) . . . 9

Connecticut and John F. DiGiovanni v. Brian K. Doehr, ____U.S. ____, 111 S. Ct. 2105, 115 L. Ed 2d 1, (1991) 7

I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. QUESTION:

WHETHER THERE WERE ANY GENUINE ISSUES OF MATERIAL FACT PRESENTED BY THE PLEADINGS AND EVIDENCE BEFORE THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA TO WARRANT DENIAL OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT AS A MATTER OF LAW?

ANSWER:

Answered in the negative by the courts below.

B. QUESTION:

WHETHER THE PETITIONERS WERE AFFORDED DUE PROCESS OF LAW IN THIS MORTGAGE FORECLOSURE ACTION?

ANSWER:

Answered in the affirmative by the courts below.

II. COUNTERSTATEMENT OF THE CASE

This case involves a simple mortgage foreclosure action. Petitioners borrowed money from Respondent as evidenced by a Note dated April 29, 1977 and secured by a Mortgage of even date on Petitioners' residence. Petitioners failed to pay their monthly installments of principal and interest when due and Respondent commenced a foreclosure action in the Court of Common Pleas of Westmoreland County, Pennsylvania at Docket Number 7157 of 1988.[1] Petitioners filed two sets of Preliminary Objections contesting, among other things, service and subject matter jurisdiction. The Preliminary Objections were overruled by the Honorable Joseph A. Hudock and the Honorable Donetta W. Ambrose on December 28, 1988 and April 6, 1989, respectively. On or about April 24, 1989, Petitioners filed an Answer and New Matter to Respondent's Complaint. Respondent replied to Petitioners' New Matter denying the defenses raised therein.

---

[1]On Page 11 of the Petition for Writ of Certiorari, Petitioners claim they made all requisite payments to Respondent. Petitioner, David Jones, admitted under oath that Petitioners failed to make all of their requisite mortgage payments when due.

Following two years of discovery, during which Petitioners initiated no discovery, Respondent filed a Motion for Summary Judgment. Following argument, the Honorable Daniel J. Ackerman granted Respondent's Motion for Summary Judgment by Order of Court dated September 12, 1990. Thereafter, Petitioners filed a Cross-Motion for Summary Judgment and, after hearing, the Honorable Richard E. McCormick denied Petitioners' Cross-Motion for Summary Judgment by Order of Court dated October 26, 1990.[2]

Petitioners filed an appeal to the Superior Court of Pennsylvania claiming that the Orders entered by Judges Ackerman and McCormick constituted abuses of discretion and should be reversed. After oral argument, the Superior Court of Pennsylvania by Order dated July 29, 1991 affirmed both decisions of the Court of Common Pleas of Westmoreland County, Pennslyvania.

---

[2]Petitioners' allegation there was no prejudgment hearing as set forth on Pages (i) and 9 of their Petition is a gross misstatement of the truth. After argument was scheduled on Respondent's Motion for Summary Judgment, Petitioners contacted Judge Ackerman and requested that the Court continue argument on Respondent's Motion for Summary Judgment. The Court rescheduled argument to accommodate Petitioners' schedule; however, Petitioners failed to appear at the rescheduled argument before the Honorable Daniel Ackerman. Petitioners also failed to appear for argument on Petitioners' own Cross-Motion for Summary Judgment before the Honorable Richard E. McCormick. Not only did Judge Ackerman conduct oral argument on Respondent's Motion for Summary Judgment, the Honorable Richard E. McCormick, Jr. denied Petitioners' Cross-Motion for Summary Judgement by Order of Court Dated October 26, 1990 after conducting a formal hearing on the matter.

Petitioners filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania requesting that the Supreme Court grant allocatur and reverse the decisions of the lower courts. After briefs were filed by both parties, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal.

III. REASONS FOR DENYING THE PETITION FOR WRIT

A. Petitioners Have Failed to Identify Any Special or Important Reason to Justify This Court Granting The Petition as Required by United States Supreme Court Rule 10.1.

This case involves a mortgage foreclosure action in the Commonwealth of Pennsylvania. The only questions of law pertain to the Pennsylvania Rules of Civil Procedure governing foreclosure actions and do not involve any issue arising under the Federal Constitution.

Petitioners' allegation that they were denied due process of law by not receiving a jury trial is ridiculous. The purpose of summary judgment is to avoid a time consuming and costly trial when no genuine issue of material fact exists in opposition to judgment. Both Judge Ackerman and Judge McCormick

found that the Petitioners failed to produce any evidence in support of their defenses in this case, granted summary judgment in favor of Respondent and denied Petitioners' Cross-Motion for Summary Judgment. Respondent is aware of no court in the United States of America where a trial by jury is required or permitted following the entry of summary judgment. As the facts in this case illustrate, Petitioners' claim that they were entitled to a jury trial is simply incorrect.

The Petition for Writ of Certiorari filed in this case is a verbatim recitation of the positions advanced before the Pennsylvania courts and the Questions Presented For Review are argumentative and repetitious, thus violating United States Supreme Court Rule 14.1(a). There are misstatements of fact throughout the Petition such as Petitioners' claim that they prepaid their mortgage obligation to Respondent. Petitioner David Jones admitted under oath during his deposition that Petitioners failed to pay the monthly payments of principal and interest when due to Respondent. Petitioner David Jones further admitted during his deposition that the Mortgage and note were never modified and that no document was ever signed by Respondent releasing Petitioners from their obligation to make the monthly payments on the loan.

Other misstatements include Petitioners' allegations that Respondent sold the loan to a third party. Mellon Financial Services, now know as Mellon Mortgage Corporation, is the servicing agent for Mellon Bank, N.A.. Mellon Bank, N.A., owns the subject loan, for which reason Respondent was the appropriate party to bring the mortgage foreclosure action. Petitioners made a grave misstatement when alleging that Mellon Bank, N.A. assigned the subject loan to a third party and did not have standing to bring this action.

Petitioners have also misrepresented the Pennsylvania Rules of Civil Procedure. Contrary to what Petitioners would have this Court believe on Pages 20 and 21 of their Petition, Pennsylvania Rule of Civil Procedure 1035 does not state that a judge has authority to determine what facts are genuine.[3]

Respondent believes that Petitioners have filed numerous pleadings to forestall, delay and complicate this mortgage foreclosure action and the Petition for Writ of Certiorari is no exception.

---

[3]Pennsylvania Rule of Civil Procedure 1035 provides, in pertinent part, as follows:

(b) . . . the judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . .

There are no special or important reasons for this Honorable Court to grant the Petition for Writ of Certiorari or to review the well-reasoned decisions of the Pennsylvania courts.[4] Accordingly, the Petition for Writ of Certiorari should be denied.

B. The Decisions of the Pennsylvania Courts Involve No Conflict of Opinion with this Court, Are Correct and Rest on Independent Nonfederal Grounds.

Petitioners Claim that the decisions of the Pennsylvania Courts in this case are in conflict with the decisions of this Court in Connecticut and John F. DiGiovanni v. Brian K. Doehr, ___U.S. ___, 111 S.Ct. 2105, 115 L.Ed 2d 1, (1991). In Doehr, a Connecticut statute which authorized a judge to allow prejudgment attachment of real property without prior notice or hearing was found to be unconstitutional by this Court. The issue presented in the Doehr case was whether the state statute authorizing prejudgment attachment violated the due process of the United States Constitution.

The present action does not involve a state prejudgment attachment statute, but rather involves a postjudgment foreclosure sale of mortgaged prop-

---

[4]The mortgaged premises has already been sold at sheriff's sale on September 3, 1991 and Respondent was the successful purchaser. Accordingly, the Questions Presented for Review in the Petition are, at best, moot issues and should not be considered by this Court.

erty. Petitioners received notice of the sheriff sale and were afforded numerous prejudgment hearings to present their defenses before the Court of Common Pleas of Westmoreland County, Pennsylvania.[5] If this Court were to accept as true Petitioners' allegations that they were not notified of the mortgage foreclosure action, the numerous hearings or the foreclosure sale, then the Court must question how Petitioners knew to file two sets of Preliminary Objections and several briefs in opposition to Respondent's Motion for Summary Judgment and in support of their own Cross-Motion for Summary Judgment. The record reflects that Petitioners were afforded more than minimal due process prior to the entry of judgment. Accordingly, the present action is clearly distinguishable from the Doehr case.

The decisions of the Pennsylvania courts in this case were correct and rest on independent nonfederal grounds. Petitioners' challenge to the Pennsylvania Rules of Civil Procedure, particularly Rules 1038 and 1150, is unfounded and was waived by Petitioners when they failed to raise this issue with the Court of Common Pleas or Superior Court of

---

[5]On or about December 28, 1988 Petitioners' First Set of Preliminary Objections was heard by the Honorable Joseph A. Hudock. On or about April 6, 1989, Petitioners' Second Set of Preliminary Objections was heard by the Honorable Donetta W. Ambrose. On or about September 12, 1990 argument was conducted on Respondent's Motion for Summary Judgment before the Honorable Daniel J. Ackerman. On or about October 26, 1990, argument was conducted on Petitioners' Cross-Motion for Summary Judgment before the Honorable Richard E. McCormick.

Pennsylvania.[6] Rule 1038 establishes the manner in which a nonjury trial is to be conducted in Pennsylvania. Rule 1150 provides that in cases where foreclosure actions are tried by a judge sitting without a jury, the trial shall be conducted in accordance with Pennsylvania Rule of Civil Procedure 1038. This case did not proceed to trial due to the fact that summary judgment was entered in favor of Respondent. Accordingly, these Rules of Civil Procedure are irrelevant to this action. Furthermore, there is no basis in the United States Constitution or in case law interpreting procedural due process to justify a finding that the referenced Pennsylvania Rules of Civil Procedure are unconstitutional.

The decisions from the Pennsylvania courts are well reasoned and rest exclusively on independent nonfederal grounds. The Petition fails to identify any basis for this honorable court to grant the Petition for Writ of Certiorari. The Petition for Writ of Certiorari is a mere reiteration of the meritless arguments advanced by Petitioners in the courts below and does not present a constitutional or other significant issue to justify this Honorable Court's review of the prior proceeding in this mortgage foreclosure case.

---

[6]Respondent raises the Petitioners' waiver of these issues prior to argument to oppose the grant of review pursuant to City of Canton, Ohio v. Harris, 489 U.S. 378, 379, 109 S. Ct. 1197, 1199, 103 L.Ed 2d 412 (1989).

CONCLUSION

The Petition for Writ of Certiorari filed by Petitioners David Jones and Catherine Jones should be denied.

Respectfully submitted,
KINCAID, McGRATH & O'KEEFE

BY: Amy E. Bentz

John R. O'Keefe, Jr., Esq.
Amy E. Bentz, Esquire

Attorneys for Respondents

Two Gateway Center, 19th Floor
Pittsburgh, PA 15222

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

(3)

No. 91-1499

In the
Supreme Court of the United States

October Term, 1991

DAVID A. JONES And CATHERINE M. JONES,
Petitioners,

v.

MELLON BANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DAVID A. JONES
Professor of Law and
Management
Graduate School of Public
and International Affairs
University of Pittsburgh
Box 7259
Pittsburgh, Pennsylvania 15213
412/734-8428

Attorney for Petitioners

April, 1992

Petitioners, David A. Jones and Catherine M. Jones hereby **reply** to the Respondent's Brief in Opposition to their Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, as follows:

I. PETITIONERS' REPLY TO RESPONDENT'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioners, [hereinafter "the Jones"] paid each and every installment on their mortgage to Mellon Bank, N.A. **when due or BEFORE** the installment became due.

The statement that "Petitioner, David A. Jones, admitted under oath that Petitioners failed to make all of their requisite mortgage payments when due" [Mellon Br. in Opposition at 2,n.1] is but half-true: over eleven (11) years, most of the installments were paid when due; some $9,000. thereof were made before these installments came due.

No prejudgment **evidentiary** hearing was

conducted prior to when "Judgment" against the Jones was entered by summary judgment. The oral arguments referenced by Mellon Bank [Br. in Opposition at 3 and 3,n.2] are **not** evidentiary hearings in any sense of that Due Proces Concept.

Mellon Bank's statement that the Jones filed a cross-motion for summary judgment "after" the lower court granted Mellon's motion for summary judgment is a bald face **lie**: the Jones filed this cross-motion on August 30, 1990, fourteen (14) days before summary judgment was entered in favor of Mellon Bank on September 12, 1990. [See Mellon Br. in Opposition at 3].

The Jones are unaware that any "formal hearing" was conducted prior to the denial of their cross-motion for summary judgment on October 26, 1990 as Mellon Bank contends [Br. in Opposition at 3,n.2] but, even if this were true, it does not alter the fact,

undisputed by Mellon Bank, that no "formal" hearing was conducted prior to September 12 when summary judgment was entered against the Jones. It would seem axiomatic that Due Process required such a "formal" hearing to occur before summary judgment was entered against the Jones, if in fact a "formal" hearing was held prior to when the lower trial court ruled on the Jones cross-motion for summary judgment against Mellon Bank.

Mellon Bank's statement that the Jones "initiated no discovery" [Br. in Opposition at 3] is false. The Jones filed and served interrogatories on Mellon Bank and moved to compel answers to the same when Mellon Bank ignored these interrogatories.

II. PETITIONERS' REPLY TO RESPONDENT'S REASONS FOR DENYING THE PETITION FOR WRIT

A. Petitioners Have Identified Special And Important Reasons To Justify A Writ Of Certiorari Under Rule 10.1.

This case involves the foreclosure of a mortgage by a Federal bank. The mortgagor Petitioners have alleged the denial of Due Process of Law under the Constitution of the United States of America, Federal case law and Federal statutes. These are issues arising under the Federal Constitution.

Mellon Bank has adopted the posture that the Petitioners' being "denied due process of law by not receiving a jury trial is **ridiculous**" [Br. in Opposition at 4 (emphasis added)], but that has never been the posture of this Court and, hopefully, never will be. This question by itself is of major constitutional as well

as public policy importance, sufficient to justify issuance of a Writ of Certiorari under Rule 10.1.

Nor is the question merely whether "a trial by jury is required or permitted **following** the entry of summary judgment" as Mellon Bank represented [Br. in Opposition at 5 (emphasis added)], but whether in the foreclosure of a Federal bank's mortgage a jury trial is required to determine whether the mortgagor Petitioners paid the mortgage according to its terms. Obviously, if a jury trial was required, it was required to be held **before** entry of summary judgment. A question of immense social importance exists as to whether the "Petitioners' claim that they were entitled to a jury trial is simply incorrect." [See Mellon Br. in Opposition at 5].

The misstatements of fact are not made by the Petitioners but by Mellon Bank. The

deposition testimony of Petitioner David A. Jones "admitted under oath" that monthly payments of principal and interest owed to the mortgagee were not paid in the month due [Mellon Br. in Opposition at 5] because these installments were paid **ahead** of when they were due, a fact question for a jury.

Mellon Bank has conceded within its Br.in Opposition at 6 that the "appropriate party to bring the mortgage foreclosure action" is the entity that "owns" the loan. Yet, long prior to the entry of "judgment" in this case the mortgagor Petitioners had received a **notice** that Mellon Financial Services Corporation Number Nine had become the **first mortgagee** on the subject loan. If true, this fact defeats the legal standing of Respondent Mellon Bank to bring the instant action. Whether this is true is a question of fact necessitating jury trial.

Respondent Mellon Bank concedes in its

Brief in Opposition at 6 that the successor to Mellon Financial Services is **Mellon Mortgage Corporation**. Petitioners ask this Court to note the cover of Respondent's Br. in Opposition where, at the top thereof, the following words are contained: "BRIEF-JONES/MM." Petitioners suggest that these words, apparently accessing the word processor from which that brief was printed document further that the real party in interest in this action is **Mellon Mortgage** or "**MM**" and not Respondent Mellon Bank, N.A.

Petitioners were unaware until reading Respondent's Br. in Opposition [at 7,n.4] that Respondent "was the successful purchaser" of the mortgaged premises at a sheriff's sale. Hardly can that fact "moot" the issues before this Court, however, as Petitioners had to exhaust their state remedies prior to bringing this Petition.

Petitioners urge this Court to note

that nowhere within its Br. in Opposition does Respondent controvert Petitioners' allegation that the lower trial court "judgment" for which review is sought in this Petition "awards" Respondent attorneys' fees far in excess of the five percent (5%) cap placed thereon by terms of the mortgage note drafted by Respondent. This is the most important policy issue raised in the Petition for Certiorari, alone justifying the issuance of that Writ, and possibly mandating summary reversal of the "judgment" below. 1/

---

1 Incredibly, Respondent commenced another action against Petitioners on January 15, 1992, this new action seeking $29,825.60 in attorneys fees resulting from the mortgage foreclosure in this Action, notwithstanding a clause in the mortgage note limiting such attorneys'fees to a maximum of five percent (5%) of the outstanding balance due under the mortgage. Five percent (5%) of the original mortgage would be a mere $4,240. Respondent has argued in its new action that Petitioners are barred from contesting the amount of attorneys' fees demanded by

B. The Decisions of the Pennsylvania Courts Conflict With Decisions Of This Court.

Respondent's observation that the "present action ... involves a postjudgment foreclosure sale of mortgaged property" [Mellon Br. in Opposition at 7 (emphasis added)] rather than prejudgment attachment of the real estate hardly buttresses the argument that this action is inapposite to Connecticut v. Doehr, ___ U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991). If a mere prejudgment attachment requires an **evidentiary** hearing under Doehr, how much more important to Due Process must be the need for the same safeguard prior to either a foreclosure judgment or a postjudgment sale of mortgaged property.

Respondent under the doctrine of collateral estoppel by the "judgment" in this Action, further underscoring importance of this case.

Petitioners never received an evidentiary hearing, before or after entry of the "judgment" they ask this Court to review, just as Petitioners were denied a jury trial on the several genuine issues of fact they raised before the lower trial court, such as how many mortgage installments they prepaid, and whether they were supposed to pay their installments to Respondent or its assignee, now Mellon Mortgage Corporation.

The decisions of the Pennsylvania courts in this case were incorrect and repugnant to Federal law, including the Federal Fair Debt Collection Practices Act, §§ 801-817 of the Federal Truth-in-Lending Act, 15 U.S.C. §1601 et seq., because the Petitioners never promised to pay Respondent attorneys fees greater than five percent (5%) of their outstanding debt under the subject mortgage. Obviously, the

Pennsylvania court decisions are not "well reasoned" nor do they "rest exclusively on independent nonfederal grounds" as the Respondent wants this Court to believe. [Br. in Opposition at 9]. Petitioners have preserved their Due Process objections from the commencement of this Action before the lower trial court. No "waiver" occurred.

"Notice" is different from service of a summons and complaint. Petitioners deny having been properly served in this Action, a denial that has violated their Federal Due Process and Equal Protection entitlements.

Respectfully submitted,

David A. Jones, Esquire
Box 7259
Pittsburgh, PA 15213
412/734-8428

Attorney for Petitioners